

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1249

To be argued by
J. REMY G. EPSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1249

UNITED STATES OF AMERICA,

Appellee,

—v.—

BARTHOLOMEW BUIGUES, ANGELO PUIG, IRMA
ANES, SUSAN HOROWITZ, and JOHN SAMMARCO.
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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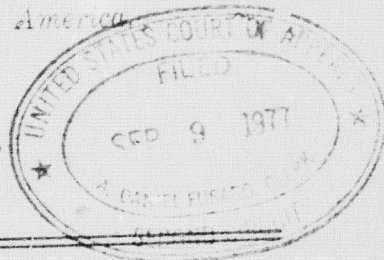


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Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Bartholomew Buigues, Angelo Puig, Irma Anes, Susan Horowitz, and John Sammarco appeal from judgments of conviction entered in the United States District Court for the Southern District of New York on January 17, 1977, after a six-day trial before the Honorable Milton Pollack, United States District Judge, and a jury.*

* Although all five defendants filed notices of appeal, neither Sammarco nor Buigues has filed a brief. On August 3, 1977, one day before his brief was due, Buigues moved for appointment of new counsel under the Criminal Justice Act and for an extension of time within which to file his brief. The motion for appointment of counsel was denied by order dated August 11, 1977, and the motion for extension of time was denied by order dated August 18, 1977.

Indictment 76 Cr. 864, filed August 31, 1976, charged Buigues, Puig, Anes, Horowitz and Sammarco in Count One with conspiracy to defraud the United States and to file false claims against the United States, in violation of Title 18, United States Code, Section 371. The indictment further charged all five defendants in Counts Two and Three with filing false claims against the United States, in violation of Title 18, United States Code, Section 287.

Trial commenced against the defendants on November 29, 1976, and concluded on December 6, when the jury found all five defendants guilty on all counts.

On January 17, 1977, Judge Pollack imposed sentence on all five defendants. Buigues received a sentence of two years' imprisonment, pursuant to Title 18, United States Code, Section 3651, with the condition that he spend three months in a jail-type institution; the balance of the sentence was suspended, and Buigues was placed on probation for two years following his term of imprisonment. Puig received a sentence of two years' imprisonment, also pursuant to Title 18, United States Code, Section 3651, with the condition that he spend two months in a jail-type institution; the balance of the sentence was suspended, and Puig was placed on probation for two years following the term of imprisonment. Anes was placed on probation for one year and fined \$1,500. Horowitz was placed on probation for one year and fined \$1,000. Sammarco received a sentence of two months' imprisonment.

Execution of sentence upon Buigues, Anes, Horowitz, and Sammarco has been stayed pending appeal. Puig has already served his term of imprisonment and is now on probation.

Statement of Facts

The Government's Case

1. A Brief Synopsis

The proof at trial demonstrated that Bartholomew Buigues and Angelo Puig, administrators of a federally funded food program for needy children, placed three acquaintances, Irma Anes, Susan Horowitz, and John Sammarco, on the program's payroll. Although these three did virtually no work, each was paid a full salary for the duration of the program. Buigues and Puig then claimed these salaries as administrative expenses in claims submitted to the United States Department of Agriculture, which administered the program. In this manner Buigues and Puig were able to obtain money fraudulently for Anes, Horowitz and Sammarco, with whom they had a variety of special relationships.

2. The Summer Lunch Program Described

During the summer of 1975, the United States Department of Agriculture administered the Special Summer Food Service Program for Children throughout the United States. This program, colloquially called the "Summer Lunch Program", was authorized pursuant to Title 42, United States Code, Section 1761, an adjunct to the National School Lunch Act, Title 42, United States Code, Section 1751 *et seq*, with the purpose of providing lunches to poor children during the summer months when the regular school lunch program was not in effect. (Tr. 28).*

In New York City, the Department of Agriculture operated the program by contracting with non-profit cor-

* "Tr." refers to the trial transcript; "GX" refers to Government Exhibit; "Br." refers to appellant's brief.

porations (colloquially termed "sponsors"). The sponsors agreed to distribute lunches to children at one or more feeding sites in the city. (Tr. 28-29). The sponsors, in turn, obtained lunches by engaging a food vendor, who had been selected through a bidding process. At the end of the summer the sponsors submitted claims to the Department of Agriculture for the expenses incurred in running their program. Each sponsor submitted two separate claims, one for July and one for August. Each claim had two principal components: (i) the cost of lunches, for which the Department would pay the sponsor a maximum of 75.25¢ per lunch, and (ii) administrative expenses, including telephone bills, travel costs, and salaries. The maximum amount a sponsor could receive for administrative expenses was 6¢ times the number of lunches served. (Tr. 36-38, 49-50).

One of the program sponsors in the summer of 1975 was an organization called "Youth In Government". Through its executive director, Angelo Puig, Youth In Government signed a contract with the Department of Agriculture on June 2, 1975, to conduct a summer lunch program. (GX 1). At the conclusion of the summer, the organization filed claims for reimbursement with the Department's regional office in Princeton, New Jersey. (GX 2-3). Although these claims were not paid in full, Youth In Government received from the Department two checks totalling approximately \$142,000 in September, 1975. (Tr. 986).

Thereafter, an audit of Youth In Government was conducted by Scott Spencer, an auditor employed by the Department of Agriculture. Spencer reviewed various Youth In Government documents, including its payroll book (GX 4) and cancelled checks. (GX 5-7). On the basis of his review, Spencer allowed in full the claims made for salaries paid to the employees of Youth In Government, including \$1,600 paid to Irma Anes and \$880

paid to both Susan Horowitz and John Sammarco. (Tr. 81-84). The payroll book examined by Spencer claimed that each of these three employees had worked seven hours per day, five days per week, for the eight weeks during which the summer lunch program operated.

3. The Operation of Youth in Government's Program

Four persons employed by Youth In Government during the summer of 1975 testified for the Government: Gary Gilchrist, Frank Rodriguez, Edward Rogers, and Pedro Rodriguez. In January, 1975, Puig spoke to Frank Rodriguez and Pedro Rodriguez about the possibility of operating a lunch program in the coming summer.* Puig then invited the two to a meeting at his apartment in the Bronx that evening.

At the meeting that evening several individuals were present, including Bartholomew Buigues. Buigues explained that the Department of Agriculture would only enter into contracts with established non-profit corporations and that it was too late to set up a new corporation. However, Buigues offered the use of an existing organization, "Youth In Government," of which he was chairman of the board. Buigues explained that Youth In Government at that time had no money and sponsored no activities. Buigues' proposal was readily accepted and it was further agreed at this meeting that those present would seek out suitable feeding sites in Manhattan from which lunches would be distributed. Both Frank Rodriguez and Pedro Rodriguez were promised supervisory positions in the lunch program. (Tr. 220-223, 355-356).

* Puig and the two Rodriguezes at that time were students at Columbia University.

In February, 1975, Puig approached two more Columbia students, Gary Gilchrist and Edward Rogers, and sought their assistance in organizing the program. Between January and June, 1975, Gilchrist, Rogers, Frank and Pedro Rodriguez all were engaged in enrolling various community organizations, churches, and day care centers as Youth In Government feeding sites. (Tr. 109-114, 223, 279, 356-357).

In June, 1975 the four students, along with Puig and Buigues, helped to set up Youth In Government's storefront office at 2176 Amsterdam Avenue in Manhattan. On June 27, 1975, the Friday preceding the formal commencement of the feeding program, a meeting was held at that office. Puig introduced Gilchrist, Rogers and the two Rodriguezes to Susan Horowitz and John Sammarco, whom he said would be supervisors in the program. None of the four original planners had ever seen Horowitz before, and only Pedro Rodriguez had ever seen Sammarco. Puig also advised the students that their own salaries would be reduced to \$110 per week, rather than \$150, as had been promised. When asked where Sammarco and Horowitz had come from, Puig told Gilchrist that they had been "appointed" by Buigues and that their hiring was beyond his control. He also told Rogers that Horowitz and Sammarco had been hired by Buigues as payment of a political debt. (Tr. 115-117, 177, 224-225, 281-283, 359).

During the operation of the food program in July and August, Gilchrist and Rogers worked as site monitors. Their duties included supervising distribution of lunches at various feeding sites, collecting receipts left by the food vendors, and reporting any problems encountered at the sites to those in the Amsterdam Avenue office. (Tr. 117-119, 284). Frank Rodriguez worked as a site monitor in July and was placed in charge of the Amsterdam Av-

enue office in August. (Tr. 226-27). Pedro Rodriguez was in charge of the same office in July and worked as a site monitor in August. (Tr. 360-361). Each of these four employees had regular opportunities to visit the Amsterdam Avenue office.

Horowitz was seen only once during the entire summer by Gilchrist, Rogers and Frank Rodriguez. Pedro Rodriguez saw Horowitz approximately four times. Sammarco was seen regularly during the first two weeks, but thereafter only on pay days. Sammarco was not seen at all during August by Frank Rodriguez, who worked at the office that month. Another employee, Irma Anes, was seen only once by Gilchrist, Rogers and Frank Rodriguez. Pedro Rodriguez saw Anes twice. The one day Anes was seen by all four was the occasion of a visit by an employee of the Department of Agriculture. Neither Sammarco nor Horowitz ever did any supervising. (Tr. 120-121, 171, 228-229, 252, 276, 285, 301-302, 396).

Despite the fact that Horowitz, Sammarco and Anes—with remarkably few exceptions—were never seen at Youth In Government's program office on Amsterdam Avenue, nor at any feeding site location, all three were carried on the books and records as regular, full-time employees who worked seven hours per day, five days per week, and each collected their full weekly salaries.

Both Horowitz and Anes held full time jobs elsewhere during the summer of 1975 at the same time they were paid as full time employees of Youth In Government. Anes was employed as an administrative assistant by Querer, Inc., a Bronx agency that assisted ex-convicts. She took no vacation during July or August, 1975, and the time sheets from Querer placed in evidence (GX 10-14) demonstrated that she usually worked an eight hour day, from 8 A.M. until 4 P.M. or from 9 A.M. until 5 P.M. (Tr. 444-452). Horowitz was employed by the

Arawak Consulting Corporation in Manhattan from July 7, 1975 through April, 1976. She applied for a job there on June 16, 1975 (GX 17) and was hired as a staff associate at a salary of \$12,000 per year. She took no vacation during July or August, 1975, and the Arawak time sheets placed in evidence demonstrated that she worked an eight hour day every day during that period. (Tr. 459-472).

4. Threats made by Buigues and Puig

Although Rogers and Pedro Rodriguez worked for the duration of the program, the two were paid only four weeks' wages. When they complained to Buigues, he accused them of "messing with his livelihood" and threatened to "shoot them down like dogs." (Tr. 286, 340-341).

Rogers encountered Puig by chance on the street in August, 1976, shortly before the indictment in this case was filed. Puig and several others immediately surrounded Rogers, and inquired whether he had testified before the grand jury. Rogers further was told that if he did testify, he would be "pushing up daisies." One of Puig's companions also threatened to hit Rogers with a car jack. (Tr. 286-288).

5. Interviews of Puig and Sammarco

On March 9, 1976, Puig was interviewed in the United States Attorney's office. After being advised of his constitutional rights he was asked about the involvement of various people in Youth In Government's summer lunch program for 1975. Puig falsely described Sammarco as a "troubleshooter" who dealt with representatives of the Department of Agriculture, such as Robert Eadie, and claimed that Sammarco worked for the program "full time." Puig stated that Horowitz

also was a "troubleshooter", with tasks similar to Sammarco's, and that she too was employed full time in the program. Puig admitted that both were hired on Buigues's recommendation. Puig described Anes's function as that of a bookkeeper; he admitted that he knew she had another full time job, but insisted that Anes worked for Youth In Government on evenings and weekends. Finally, Puig admitted that Anes was Buigues's girl friend and was employed at Buigues's request. (Tr. 490-500).

On August 4, 1976, Sammarco was interviewed at the office of the Federal Bureau of Investigation in New Rochelle, New York. He was advised of his constitutional rights and asked about his role in Youth In Government's 1975 summer lunch program. Sammarco said that Buigues had approached him in June, 1975 and asked him to invest \$1,000 in a summer lunch program. Buigues told him that the money would be returned with a profit during the course of the program. Buigues also explained that the investment, plus profit, would be returned to Sammarco in the form of salary from the program. Sammarco then obtained the money and offered to give Buigues a bank draft, but Buigues insisted on cash. Sammarco gave Buigues the cash and toward the end of June received a phone call instructing him to report for work.

During the interview with the F.B.I. Sammarco maintained that he had worked for Youth In Government as an "assistant coordinator", with principal responsibility for investigating violations of U.S.D.A. regulations in the distribution of lunches. Sammarco conceded that he had been absent ten days during the eight week program. He stated that he saw Horowitz only three times during the program, but that she had been paid regularly. Sammarco also advised that Horowitz had obtained her job through her boy friend, Joel Barkan, an acquaintance of Buigues. Finally, Sammarco said that in January, 1976 he had received telephone calls from Buigues, who

told him that there was an investigation under way but that he should not worry about it. Sammarco taped this conversation. (Tr. 503-514, 524).*

The Defense Case

1. Bartholomew Buigues

Buigues testified in his own behalf. He stated that he was chairman of the board of Youth In Government and was employed by the office of Civil Rights of the Department of Health, Education, and Welfare. The summer lunch program was Youth In Government's only source of funding, and it sponsored no activities except this program. (Tr. 965, 1013-1014).

While the lunch program was being organized in early 1975, Buigues approached a colleague at HEW, Frank Cedo, and sought his assistance in obtaining \$1,000 "seed money" for the program. Cedo in turn approached Sammarco and secured the money from him, in the form of ten \$100 bills. Cedo gave the money to Buigues, who opened a Youth In Government bank account in April, 1975. Buigues then deposited \$900 in the account. In May, 1975, Buigues withdrew \$408 of that sum to pay an overdue electricity bill of his own. (Tr. 620-625, 972-978).

In June, 1975, Youth in Government submitted an application to the Department of Agriculture for participation in the 1975 summer lunch program, along with a proposed list of feeding sites for approval. In late

* During a recess in the trial Sammarco encountered Angelo Melonas, the F.B.I. agent who testified about this interview. Sammarco told him that he never would have spoken to him that day if he knew that a trial would result. He also told Melonas that the statements he made during the interview were false. (Tr. 514-515).

June, just before the start of the program, the Department approved Youth In Government's application but reduced the number of feeding sites. Buigues contended that this reduction necessitated a reduction in the program's budget, and that, accordingly, the salaries of all employees were reduced to \$110 per week. The only exceptions to this reduction were Puig, whose salary remained at \$250 per week, and Anes, whose salary remained at \$200 per week. Buigues explained that the salaries of these two alone were not reduced because it would have been inappropriate for those on the executive level to make no more than the staff workers. (Tr. 988-990).

Buigues claimed that Sammarco was hired because he helped to develop the program and not because he loaned Buigues money. Buigues further testified that he did not find out that Sammarco was the source of the \$1,000 investment until after he hired him. (Tr. 993-994, 1020-1022).

Buigues said he met Horowitz a few months prior to the commencement of the program; she said she was looking for work and he then hired her. Horowitz was an acquaintance of Joel Barkan, who at the time was Buigues's immediate superior at HEW.* (Tr. 995-996, 1009-1011).

Buigues acknowledged that Anes was the mother of his child and lived with him periodically during the summer of 1975, but denied that she was hired "solely" for that reason. Buigues claimed that Anes was hired because she was a competent bookkeeper, even though he knew she had another full-time job. (Tr. 997-998, 1017-1019).

* On April 27, 1975, and January 19, 1976, Barkan approved salary increases for Buigues totalling approximately \$2,400.

Finally, Buigues maintained that none of the employees of Youth In Government worked seven hours per day. Buigues described the entry of seven hours in the Youth In Government payroll book beside the name of each employee for each day of the program as "just an exercise of pro forma." Buigues could not recall whether he had ever seen the payroll book, but admitted signing all Youth In Government paychecks. (Tr. 1000-1006, 1014).

2. Angelo Puig

Puig, the executive director of the 1975 program, also testified in his own behalf. Puig explained, as did Buigues, that the reduction in feeding sites by the Department of Agriculture required that all employees except Puig and Irma Anes take salary cuts. Anes's salary was not reduced because she did more work and had greater responsibility than others. (Tr. 780-795, 859-860).

Puig testified that Horowitz and Sammarco volunteered to work in the program in June, 1975 and were hired on Buigues's recommendation. Neither had worked to establish the program prior to that month. Buigues also recommended the hiring of Anes, whom Puig knew to be the mother of Buigues's child. Puig also knew that Anes had another job when she was hired. (Tr. 848, 868-871, 878-879).

According to Puig, each monitor worked no more than 1½ hours per days, and no more than that was required to perform the job satisfactorily. He maintained that Sammarco was employed as a "trouble-shooter monitor" and communicated daily with employees of the Department of Agriculture over problems in the distribution of

lunches.* Similarly, Puig asserted that Horowitz was employed as a "monitor vendor-troubleshooter" whose principal responsibility was visiting the food vendor and overseeing the manufacture and distribution of lunches. Her job required 2 to 3 hours of work daily. Anes was described as a bookkeeper who worked approximately 3½ hours each evening after her job at Querer, Inc. (Tr. 797-803, 879, 892).

Puig acknowledged familiarity with Youth In Government's payroll book and stated that its entries of seven hours per day of work for each employee were incorrect. Puig, who signed the weekly pay checks, stated that all employees were paid regardless of how many hours worked or how many days of work missed. Puig reviewed the claims submitted to the Department of Agriculture with Anes prior to their submission. He admitted that the claim for "administrative costs" included a sum for salaries paid. (Tr. 879-884, 889-890).

Puig, along with several others, met Rogers on the street in August, 1976. Rogers asked him when he would receive the balance of his salary from Youth In Government, and Puig told him that he would not be paid for the weeks in which he failed to turn in a weekly report. During this conversation, which became heated, a stranger approached the group brandishing a stick and threatening to hit someone. The meeting then broke up. Puig denied that any of his acquaintances threatened to hit Rogers, or that Rogers was asked if he had been to the United States Attorney's Office. (Tr. 811-814, 899-902).

* Puig testified that Sammarco worked between 2 and 2½ hours per day and missed approximately eight days of work during the summer.

3. Irma Anes

Anes also testified in her own behalf. She admitted that she worked full time as an administrative assistant at Querer during the summer of 1975. Anes claimed that she volunteered for a job as a bookkeeper at Youth In Government shortly before the summer program began. Her hours at Youth In Government were approximately 6:00 P.M. until 1:00 A.M. each evening. (Tr. 701-705).

Anes did not know how many hours Sammarco, Horowitz or any other Youth In Government employee worked. She could not recall how often she had seen the other employees during the program. (Tr. 733-739, 749-752). She was responsible for making out the payroll book and admitted entering seven hours per day beside the name of each employee each day. She did so on the instructions of Pedro Rodriguez, who told her that it was "standard procedure" and would create no problems. Anes admitted that she knew that these entries were inaccurate when she made them. (Tr. 714, 738-740, 760-761).

4. Susan Horowitz

Horowitz did not testify, but called several character witnesses and Robert Eadie, an employee of the Department of Agriculture who was Manhattan borough coordinator for the summer lunch program in 1975. Eadie visited the Youth In Government office on July 31, 1975 to conduct an "on-site inspection." In the course of the visit he filled out a USDA form entitled "Administrative Review Report." (Defendant Horowitz's Exhibit AF). In that portion of the form calling for an enumeration of "Sponsor Personnel on Day of Visit" there were listed all Youth In Government employees, including Horowitz

and Sammarco. Eadie explained, however, that he did not recall seeing either Horowitz or Sammarco on that day; he had interpreted that portion of the form to require a listing of all those employed by the sponsor, not all those present during the visit. (Tr. 562-567, 583-585, 597-599).

Eadie further stated that in the course of his work he spoke to employees of Youth In Government between five and ten times daily. He recalled speaking to Puig, Buigues and Pedro Rodriguez, and recognized some Youth In Government monitors, such as Gilchrist. He neither recognized nor recalled speaking to either Horowitz or Sammarco. (Tr. 600-602).

Nat Paul Massielli, an employee of AM-PM Food Service testified that his concern had been Youth In Government's vendor during the summers of 1975 and 1976. The bid AM-PM submitted to Youth In Government for 1975 was for 75.25¢ per lunch, the maximum permitted by Department of Agriculture regulations. AM-PM received approximately \$130,000 from Youth In Government in the summer of 1975, and between \$100,000 and \$200,000 in the summer of 1976. Each sponsor served by AM-PM in 1975 sent an employee to the AM-PM plant to review the quality of the lunches. Massielli stated that he saw Horowitz, the Youth In Government representative, nearly every morning during that summer. (Tr. 635-650).

5. John Sammarco

Sammarco did not testify. Laura Sammarco, his aunt, Linda Sammarco, his sister, and two acquaintances, Barbara Price and John Mowbray, all testified that they called him during the course of the summer of 1975 at

the Youth In Government office and that he was usually present to receive the call. (Tr. 611-617, 928-935). Laura Sammarco further testified that Sammarco had obtained a \$1,000 loan from another aunt, Helen Sammarco, in April, 1975. Sammarco in turn gave the money to Frank Cedo. (Tr. 611-613).

Government's Rebuttal Case

Douglas Andrews, a graduate student in medieval history at Columbia, testified that in the summer of 1975 he had been employed by the Department of Agriculture as a monitor. His specific function was monitoring the sites of Youth In Government, and in the course of his work he paid daily visits to its feeding sites. He also paid several visits to the Amsterdam Avenue office. Although in the course of the summer he met with several Youth In Government employees, he never met either Horowitz or Sammarco. With the exception of Puig, he was unable to identify any of the defendants. (Tr. 1058-1059, 1065-1066).

Whenever Andrews observed a violation of Department regulations, such as poor quality food or the consumption of food by adults, he completed a "violation report." (GX 25). One copy of this report was sent to the sponsor, another to the vendor, and another was kept by the Department. The sponsor also was advised orally of the problem and was expected to advise the vendor if necessary. In early July, 1975, Andrews noticed that the juice containers included in the Youth In Government lunches were defective and so advised Puig. Puig promised that the defect would be corrected, but the problem thereafter remained unsolved for a substantial period of time. (Tr. 1060-1061, 1066-1067).

ARGUMENT

POINT I

The Government's Evidence Against Puig Was Sufficient to Warrant Conviction.

Puig's sole argument on appeal is that the evidence was insufficient to warrant his conviction. He claims that the proof showed that Sammarco, Horowitz, and Anes all performed some work in Youth In Government's summer lunch program. He also contends that even if each worked less than seven hours per day—and Puig knew of this practice—this was insufficient to establish an intent to defraud the United States or to file false claims for wages.

Puig's argument misstates the evidence and the manner in which it must be viewed by this Court. Viewed in the light most favorable to the Government, *United States v. Amrep Corporation*, Dkt. No. 77-1150, slip op. 5157, 5159 (2d Cir., Aug. 8, 1977),* the evidence plainly established that Puig knowingly defrauded the Government by placing these three individuals on the payroll and causing them to be paid—at Government expense—for work never performed.

There is no question that Horowitz, Anes, and Sammarco appeared for work infrequently and did virtually nothing on the few occasions when they did appear. Horowitz held a full time job at Arawak Consulting Corporation from July 7, 1975 through the duration of the program, and was seen on only one occasion by most of the program's employees. Although it was claimed that she acted as a "vendor liaison", there was no evidence

* See also *Glasser v. United States*, 315 U.S. 60 (1942).

that she accomplished anything in this position. Indeed, the one problem that arose during the summer with the vendor's merchandise, the defective juice containers, see *supra* at 16 remained unattended for weeks. (Tr. 1066-1068). Anes also was employed full time in another job—with Querer, Inc.—and the jury was entitled to disbelieve her testimony that she worked each evening at Youth In Government's office from 6:00 P.M. to 1:00 A.M. All Anes appeared to have done for the program was to maintain the payroll book. Similarly, Sammarco appeared at the Youth In Government offices slightly more frequently; he was there for the first two weeks and thereafter only on paydays. He was not seen at all during the month of August by Frank Rodriguez, who was stationed in the office that month. (Tr. 276). Nor did Sammarco perform any work. Although it was claimed (Tr. 497, 801-802) that Sammarco dealt extensively with U.S.D.A. representatives, particularly Robert Eadie, neither Eadie nor Andrews, the other U.S.D.A. employee who testified, could identify him. (Tr. 602, 1065). The jury was entitled to conclude that Sammarco was present to oversee his \$1,000 investment, for which he expected a return in the form of salary checks, (Tr. 509-510) and for no other reason.

Puig's awareness of the fraudulent nature of the alleged employment of Horowitz, Anes and Sammarco was unmistakable. As the program's director, he was present at work daily and could hardly have failed to notice the absence of these three employees. Further, it was Puig who suddenly introduced Sammarco and Horowitz as "supervisors" on June 27, 1975, the eve of the program, after other employees had worked months to establish the operation and ready it for the 1975 summer. (Tr. 115-117). Indeed, it was undisputed that neither Horowitz nor Sammarco ever supervised anyone. (Tr. 120-121). Moreover, Puig told Gilchrist that he did not want to hire either Horowitz or Sammarco, but that the

situation was beyond his control. (Tr. 177). He also told Rogers that the two had been hired to satisfy Buigues's political debts. (Tr. 283). Puig nevertheless signed all salary checks for these three individuals (Tr. 883) and reviewed the claims submitted to the Department of Agriculture with Anes before their submission. (Tr. 889-890). These claims, of course, included the cost of the salaries for Horowitz, Sammarco and Anes.

The jury also was entitled to find strong evidence of Puig's fraudulent intent in his treatment of Youth In Government's records. Puig admitted during his testimony that he knew that several of the employees did not work anything approaching a seven hour day (Tr. 797-803, 878-879). He also admitted that Sammarco had missed at least eight work days, which represented 20% of the program. (Tr. 892). Nevertheless, Puig permitted the organization to maintain a payroll record book (GX 4) which falsely reflected that Anes, Sammarco, and Horowitz each had worked seven hours per day, five days per week, for the duration of the program. (Tr. 880).

Puig argues (Br. 9-10) that the maintenance of false payroll records does not establish his intent to defraud the Government because there was no evidence that these fraudulent records were relied upon in the Government's reimbursement of the claim. This argument is flawed. First, the contract between the Department of Agriculture and Youth In Government, *which Puig signed*, (GX 1) obligated the organization to keep proper records. Under the boldface heading "Record Keeping Requirements" the contract stated:

"The institution must keep full and accurate records respecting its food service to serve as a basis for the claim for reimbursement and for audit and review purposes."

Second, the U.S.D.A. auditor, Spencer, testified that he consulted the payroll book when conducting the audit,

and that auditors were entitled to disallow excessive salary claims (Tr. 103-104). As presented in the payroll book, the salary claims for Youth In Government appeared reasonable; had the time sheets been accurate, of course, the auditor's conclusions would have been substantially different.* Third, the maintenance of false payroll records *per se* clearly established Puig's guilt. In *Ebeling v. United States*, 248 F.2d 429 (8th Cir.), *cert. denied*, 355 U.S. 907 (1957), a prosecution under 18 U.S.C. § 1001, it was held that a defendant could be found guilty under that statute even if he had not directly presented a false document to a federal agency. It was sufficient if the false documents prepared by the defendant formed a part of another submission presented to the agency. Here, although the payroll book was not presented to the Department of Agriculture along with the claim form, the cost of salaries—computed on the basis of the payroll book—was a component of the claim presented.

Further evidence of Puig's guilty knowledge can be found in the several false statements made by him during the interview in the United States Attorney's Office on March 9, 1976. When questioned about the activities of Sammarco and Horowitz, Puig insisted that both had worked "full time" for Youth In Government during the summer of 1975. (Tr. 497, 503). He repudiated that characterization during his trial testimony, and stated

* There is also no merit to Puig's argument that the number of hours worked by a sponsor's employees was a matter of indifference to the Department of Agriculture, and that the Department's only concern "was whether the work was done, not how long it took". (Br. 10) The Department's interest in the hours worked is plainly shown in its form entitled "Application for Participation," which was submitted by all sponsors, including Youth In Government. (Defendant's Exhibit E). The application requires the sponsor to list all its employees, the number of hours per day they would work, and the proposed hourly wage.

that each had worked only approximately three hours per day (Tr. 801-803). During the same interview, he also evasively described their roles as "troubleshooters" (Tr. 497). These statements, demonstrably false, were substantial evidence of Puig's guilt, and fall within the settled rule in this Court that false exculpatory statements are circumstantial evidence of guilty knowledge and have independent probative force. *United States v. Parness*, 503 F.2d 430, 438 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); *United States v. Tropicano*, 418 F.2d 1069 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970); *United States v. DeAlesandro*, 361 F.2d 694 (2d Cir.), *cert. denied*, 385 U.S. 842 (1966).

Finally, any possible claim of insufficiency was totally dispelled by the evidence of Puig's threats made to Rogers. Rogers was told just weeks before the indictment was filed that if he testified before the grand jury he would be "pushing up daisies" (Tr. 288).^{*} The law is clear that "evidence of conduct designed to impede or prevent a witness from testifying is admissible as showing consciousness of guilt." *United States v. Alberti*, 470 F.2d 878, 882 (2d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973); *United States v. Cirillo*, 468 F.2d 1233, 1240 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973).

In sum, Puig's willingness to employ Anes, Sammarco and Horowitz; his acquiescence in their failure to work; his signing of their paychecks; his willingness to falsify payroll records to conceal their failure to work; his lies when questioned about the program; and his threats against a Government witness demonstrated overwhelmingly his intent to defraud the United States.

* Although Rogers did not attribute this statement to Puig (Tr. 407), it was made by one of Puig's colleagues in Puig's presence, at a time when Rogers was surrounded. Of those who confronted Rogers, only Puig was indicted.

POINT II

The Evidence Was Sufficient to Establish Horowitz's Intent to Defraud the United States.

Defendant Horowitz also seeks reversal of her conviction on the grounds that the evidence was insufficient. Specifically, Horowitz claims that there was insufficient proof that she possessed any fraudulent intent, and that even if fraudulent intent was shown, there was no evidence that she intended the United States to be the object of her fraud. As in the case of defendant Puig, these contentions simply ignore the evidence adduced at trial and the jury's right to draw reasonable inferences and to find the facts. *United States v. Greenberg*, 534 F.2d 523 (2d Cir.) (*per curiam*), *cert. denied*, 429 U.S. 831 (1976); *United States v. Taylor*, 464 F.2d 240 (2d Cir. 1972).

There was ample evidence from which the jury could infer Horowitz's fraudulent intent. Horowitz held a job with the Arawak Consulting Corporation at which she worked eight hours daily. She started this job on July 7, 1975, one week after the summer lunch program started. Moreover, the employment application she submitted to Arawak (GX 17), dated June 16, 1975, stated that she was able to start work "immediately". Although this application was submitted at a time when she was supposedly working to establish the summer lunch program, no mention of this was made in the application. There was also substantial evidence—from four Government witnesses—that on June 27, 1975, Horowitz was introduced to them by Puig as their supervisor. Thereafter, Horowitz did no supervising; indeed, none of the four ever saw her again, either during the regular course of their duties or in one of the staff meetings held during the summer.

Finally, the evidence showed that no need existed for the job Horowitz supposedly held, "monitor vendor—

troubleshooter" (Tr. 802), and further that Horowitz performed no work in this alleged position. Prior to commencement of the program, Youth In Government submitted to the Department of Agriculture an application for participation (Defendants' Exhibit E) to which was appended a proposed budget (Defendants' Exhibit D). The proposed budget, which listed various job titles and proposed salaries, mentioned the positions of director, supervisor and monitor, but made no mention of any position such as "vendor liaison." Moreover, the evidence showed that there was no need for an employee of the sponsor to be present daily at the vendor's offices. Since the violation reports made out by U.S.D.A. monitors such as Andrews (GX 25) automatically were sent to the vendor himself, the vendor was apprised directly by the Department of Agriculture of any defects in the lunches served. Finally, in the one instance where a defect in the vendor's product was discovered, Horowitz did nothing to rectify the problem in her supposed role as "vendor liaison." Andrews testified that the faulty juice containers of which he complained were still being used for a substantial period after this problem was noted and brought to Youth In Government's attention. (Tr. 1066-1068). From all of these facts the jury was entitled to conclude that Horowitz's job was a sham, that she performed no work whatsoever, and that she was placed on the payroll to satisfy what Puig described as a political debt of Buigues. (Tr. 288).

Horowitz next argues that the Government failed to prove that she knew that the United States was being defrauded by her receipt of wages for not working. (Br. 17). This argument is both factually and legally inaccurate. Quite simply, the jury was entitled to infer that someone like Horowitz, who possessed a master's degree in social work and an extensive background of

work in government programs,* knew the source of her pay checks. Moreover the record discloses a specific incident which surely revealed to her that she was being paid with federal money. Both Buigues (Tr. 1001-1002) and Anes (Tr. 717-719) testified that they were unable to pay the employees of Youth In Government in August because they had not yet received money from the Department of Agriculture. A staff meeting was held and the employees were told that they could not presently be paid, but that they would be paid "as soon as the money from the Government came in." (Tr. 718). According to Anes, Horowitz was present at that meeting. Accordingly, Horowitz's salary checks (GX 5) are all dated either in July or in September, after money was received from the Department of Agriculture. The testimony of Anes and Buigues on this point alone was sufficient for the jury to infer that Horowitz knew that she was receiving federal funds.

Horowitz's contention is similar to that presented by the defendant in *McGunnigal v. United States*, 151 F.2d 162 (1st Cir.), *cert. denied*, 326 U.S. 776 (1945). The defendant was employed by a private shipyard and was engaged in building a ship pursuant to a Government contract. He caused entries to be made on his time sheets that overstated the hours he had worked. On appeal, he argued that the evidence showed only that he had intended to defraud the shipyard, not the United States. The Court held that the trial judge properly had presented the question of the extent of the defendant's knowledge to the jury, and the jury found that the defendant possessed the requisite knowledge. Here too, Judge Pollack carefully charged the jury that in order to convict, they had to find "a specific intent . . . to defraud the United States or to

* Horowitz's application for employment to Arawak (GX 17) stated that she had previously worked for the Mayor's Education Task Force, the Children's Aid Society, and the Bureau of Child Guidance. She also listed as references two employees of the federal government, J. Barkan and A. Rivera.

submit to the United States Department of Agriculture false, fictitious, [and] fraudulent claims." (Tr. 1213). By its verdict the jury found that Horowitz possessed such intent and no more than that was required.

Horowitz's reliance on *Lowe v. United States*, 141 F.2d 1005 (5th Cir. 1944) is misplaced. *Lowe* was a case, like *McGunnigal*, involving an employee of a private shipbuilder who worked pursuant to a Government contract and inflated his claims for wages. No trial was had in *Lowe*, and the only question before the Court of Appeals was the facial validity of an indictment that charged the employee with making false statements in a matter within federal jurisdiction. Hence the Court was not presented with a situation where, as here, proof was adduced at trial that the defendant knew that the Government was the source of his wages. Indeed, *Lowe* has been so construed by the cases that have cited it:

"We read the [*Lowe*] opinion as implying that there was in that case no charge, or anything to show, that the employee knew that the work which he was doing, and the wages which he claimed, had been made the subject of an express contract provision between his employer and the Government, constituting them a matter of direct charge and reimbursing obligation on the part of the United States." *Ebeling v. United States*, 248 F.2d 429, 435 (8th Cir.), *cert. denied*, 355 U.S. 907 (1957).

This Court also has limited *Lowe* to its peculiar facts. *United States v. Candella*, 487 F.2d 1223, 1226 (2d Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). See also *United States v. Beasley*, 550 F.2d 261, 273 (5th Cir. 1977).*

* Furthermore, while an employee of a shipbuilder, a profit making organization that contracts with both public and private agencies, might be unaware of the source of his salary, the same

[Footnote continued on following page]

Finally, Horowitz contends that her conviction cannot stand because she played no role in preparing or submitting the false claims, and had no knowledge of their contents. Horowitz recognizes, as she must, that she is charged here as an aider and abettor, one who caused false claims to be filed. As such, Horowitz was properly convicted on Counts 2 and 3 so long as she knew that the Government was the source of her salary and so long as a claim was filed with the Government. Horowitz's reading of 18 U.S.C. § 287, on which she bases her argument, is unduly restrictive. In reviewing the legislative history of the False Claims Act, the Supreme Court has held that the Act was "intended to reach all types of fraud, without qualification, that might result in financial loss to the government." *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968). The Court declined "to accept a rigid, restrictive reading," *ibid.*, and construed the statute to cover "all fraudulent attempts to cause the Government to pay out sums of money." 390 U.S. at 233.* Horowitz's receipt of money for work not performed, when she knew that the Government was the source of her salary, is sufficient to make her guilty of causing a false claim to be filed. See *United States v. Erb*, 543 F.2d 438, 445-446 (2d Cir.), *cert. denied*, 429 U.S. 981 (1976).**

cannot be said of an employee of a non-profit corporation working on a city wide—and highly publicized—social welfare program.

* *Neifert-White* was a civil forfeiture action brought pursuant to 31 U.S.C. § 231. Both that statute and 18 U.S.C. § 287 derive from the same original statutes, R.S. §§ 3490 and 5438 (1874).

** In *Erb*, the defendant DeBoer had been convicted of aiding and abetting the filing of a false registration statement with the SEC. The statement falsely identified a person other than DeBoer as the owner of a block of stock. DeBoer claimed that he could not be convicted because he played no role in the preparation, signing, or filing of the registration statement. This Court found that DeBoer had instructed his partners to issue his stock in another's name and that he knew that there would subsequently be a registration statement filed. This was sufficient to make DeBoer an aider and abettor in the false filing, even though he played no part in its preparation.

POINT III

Anes Was Not Deprived of the Effective Assistance of Counsel.

At trial, a single lawyer, Ernest H. Hammer, represented defendants Buigues, Puig, and Anes. Although Judge Pollack went to extraordinary lengths to insure that each of these defendants fully appreciated the consequences of this choice of joint representation, Anes nevertheless now complains that by acquiescing in her demand that Hammer represent her, Judge Pollack deprived her of the effective assistance of counsel. To state the argument is to demonstrate its absurdity.

After Hammer appeared on behalf of the three defendants at their arraignment on September 9, 1976, Judge Pollack became concerned about the possibility of a conflict of interest arising from such joint representation. The district judge therefore required the submission of affidavits from the three defendants in which each acknowledged awareness of the possibility of such conflict, the absence of any actual conflict, and a willingness to be represented by Hammer. The affidavits were then submitted (Tr. of Nov. 24, 1976, at 2-3). Shortly thereafter this Court decided *United States v. Carrigan*, 543 F.2d 1053 (2d Cir. 1976), which reemphasized that "the proper course of action" in a case of multiple representation by a single lawyer was to conduct "a hearing to determine whether a conflict exists to the degree that a defendant may be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment." 543 F.2d at 1055. Judge Pollack therefore held a hearing,

addressed specifically to the issues raised in *Carrigan*, on November 24, 1976.*

At the hearing (Tr. of Nov. 24, 1976, at 4-14), Judge Pollack first set forth in summary fashion what the Government intended to prove. He explained the nature of the specific proceeding and asked each defendant individually if he or she understood its purpose (Id., p. 12). He ascertained that all three defendants intended to testify (Id., p. 9). Judge Pollack inquired directly of each defendant and of Hammer whether he or she saw any possible conflict of interest arising from a joint representation. All, including Anes, (Id., pp. 9-10) answered in the negative. Each defendant also stated his or her desire to be represented by Hammer (Id., p. 12). On this basis, Judge Pollack found that each defendant had knowingly and intelligently waived the right of separate representation (Id., p. 14).

The thoroughness of Judge Pollack's inquiry disposes of Anes's argument. As this Court observed in rejecting a similar claim in *United States v. Mari*, 526 F.2d 117 (2d Cir. 1975), *cert. denied*, 429 U.S. 941 (1976):

"In any event *DeBerry*** only requires that the trial judge conduct a careful inquiry, including a personal interrogation of the defendants to satisfy himself that no conflict exists and that the parties had no valid objection to joint representation. That inquiry was made here." 526 F.2d at 119.

* The hearing was held outside the presence of the prosecutor and the minutes ordered sealed. After Anes filed her brief in this Court, the Government moved to unseal the minutes. The motion was granted by Judge Pollack by order dated August 11, 1977.

** *United States v. DeBerry*, 487 F.2d 448 (2d Cir. 1973).

See also *Abraham v. United States*, 549 F.2d 236 (2d Cir. 1977); *United States v. Vowter*, 500 F.2d 1210, 1211 (2d Cir.), *cert. denied*, 419 U.S. 1069 (1974). It remains the law in this Circuit that a defendant can waive the right of separate representation. See *United States v. Mari*, *supra* 526 F.2d at 119 (Oakes, J., concurring). See also *Abraham v. United States*, *supra*.* The trial judge's responsibility is to assure that this waiver is made knowingly and with full awareness of its consequences. Judge Pollack certainly discharged that responsibility in this case.

Anes's claim further must fail because nowhere has she demonstrated any prejudice from the joint representation. As this Court observed in *Carrigan*:

"It is settled in this Circuit that some specific instance of prejudice, some real conflict of interest, resulting from a joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel." 543 F.2d at 1055.

See also *Abraham v. United States*, *supra*; *United States v. Mari*, *supra*, 526 F.2d at 119; *United States v. Vowter*, *supra*, 500 F.2d at 1211; *United States v. Lovano*, 420 F.2d 769, 773 (2d Cir.), *cert. denied*, 397 U.S. 1071

* In *Abraham*, this Court stated that "in an appropriate case, the court may order that the defendant be represented by independent counsel." 549 F.2d at 239. This pronouncement, of course, recognizes that the trial court may not be satisfied that defendant has made a knowledgeable waiver, or may find that despite the waiver, an actual conflict of interest is real and unavoidable. In either such event, the trial judge may be justified in ordering independent counsel, despite defendant's wish to the contrary. Neither situation was presented here, since it was clear that each defendant's waiver was fully informed and knowledgeable and since no actual conflict appeared to the trial judge at the time of his extensive inquiry.

(1970). None of the situations giving rise to a conflict of interest can be found here. This was not a trial in which one defendant took the witness stand and another, represented by the same lawyer, did not, as in *United States v. Carrigan*, *supra*, 543 F.2d at 1056. Nor did two defendants testify and offer conflicting defenses, as in *United States v. Lovano*, *supra*, 420 F.2d at 773. Nor, finally, did one defendant incriminate another in his testimony, as in *United States v. DeBerry*, *supra*, 487 F.2d at 453. Indeed, here all three defendants testified and presented a coordinated and consistent defense in which they claimed that work had been done for Youth In Government and that no fraud ensued.

Anes, however, claims to have been prejudiced by evidence presented at trial showing that both Buigues and Puig at various times had threatened a Government witness, Edward Rogers. (Tr. 286-288, 340-341). Anes claims that she did not know of this evidence prior to trial, and therefore Judge Pollack was obligated to reopen his inquiry into conflict of interest among the defendants when this evidence was introduced. This contention does not advance Anes's claim of a denial of effective assistance of counsel. First, any prejudice to Anes arising from this evidence resulted from her being *tried* jointly with Buigues and Puig, and not from being *represented* jointly with them. Moreover, Anes does not point to anything about this evidence that caused her counsel to alter his trial strategy to her detriment, nor does she suggest any way in which her counsel's representation was hampered by this evidence against her co-defendants. In the absence of such a showing, her argument is reduced to the complaint, made frequently in multi-defendant cases, that unpleasant evidence regarding one defendant taints others by association. Such an argument has no grounding in the Sixth Amendment. Second and most importantly, Judge Pollack on three

occasions during the trial (Tr. 287, 289, 340) and once in his charge (Tr. 1234-1235) gave the jury careful instructions that the evidence of threats was admitted only against the particular defendant who made them. These instructions were plainly sufficient to protect Anes against any possible prejudice.*

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
 Southern District of New York,
 Attorney for the United States
 of America.*

JEREMY G. EPSTEIN,
 ROBERT J. JOSSEN,
*Assistant United States Attorneys,
 Of Counsel.*

*It is also asserted in Anes's brief that she contributed nothing toward Hammer's fee, her portion of which was paid by Buigues. (Br. 7-8). This, claim, however, is belied by the representation made during the hearing conducted by Judge Pollack, in which all three defendants, including Anes, assured the district judge that all were contributing toward Hammer's fee. (Tr. of Nov. 24, 1976, at p. 11).

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Jeremy G. Epstein, being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

two That on the 9th day of September, 1977
he served a copy of the within line F
by placing the same in a properly postpaid franked
envelope addressed:

Daniel J. Sullivan, Esq.
250 Park Avenue
New York, NY 10017

Richard E. Rieley, Esq.
161 E. 42nd St.
New York, NY 10017

Joseph I. Stone, Esq.
277 Broadway
New York, NY 10007

Ernest H. Hammer, Esq.
60 E. 42nd Street
New York, NY 10017

W. Paul Flynn, Esq.
132 Temple Street
New Haven, Conn. 06510

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for
mailing inside the United States Courthouse, Foley
Square, Borough of Manhattan, City of New York.

Annex

Jeremy G. Epstein

Sworn to before me this

9th day of Sept. 1977

Mary L. Aven

MARY L. AVEN
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in B.C.
Commission Expires 3/30/79

